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In the Supreme Court of the United States

October Term, 1982

RICHARD G. SYMANOWICZ,
Petitioner,

vs.

ARMY AND AIR FORCE EXCHANGE SERVICE

and

EMPLOYERS INSURANCE OF WAUSAU

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Seventh Circuit

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QUESTION PRESENTED

1. The Treaty of Mutual Cooperation and Security between the United States of America and Japan and Status of Forces Agreement should be given judicial notice in a workers' compensation claim where failure to do so creates an international conflict of law and results in an unjust decision to the claimant.

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OPINIONS BELOW

The unreported opinion of the Court of Appeals, rendered on March 16, 1982, is included in Appendix A. The decisions and orders of the Benefits Review Board, November 28, 1980, and the Administrative Law Judge, March 26, 1979, in the United States Department of Labor are also included as Appendix B and Appendix C, respectively.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on March 16, 1982. The order denying petitioner's timely Petition for Rehearing En Banc was entered on June 28, 1982. This Petition was filed within ninety days of that date.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

LAWS INVOLVED

Both United States and Japanese workers' compensation laws enter into the facts of this case; they are not an issue in this Petition. The only law at issue herein is that which governs treaties and the Treaty which is at issue:

Constitution of the United States of America, Article VI, Clause 2, Supreme Law:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State of the Contrary notwithstanding.

Treaty of Mutual Cooperation and Security Between the United States of America and Japan and Status of Forces Agreement signed January 19, 1960, 11 U.S.T. 1632:

(Full text *infra*, Appendix E.)

Agreement under Article VI of the Treaty of Mutual Cooperation and Security Between the United States of

America and Japan, regarding Facilities and Areas and the Status of the United States Armed Forces in Japan, January 19, 1960, 11 U.S.T. 1652, Article XVIII:

> 5. Claims (other than contractual claims and those to which paragraphs 6 or 7 of this Article apply) arising out of acts or omissions of members or employees of the United States armed forces done in the performance of official duty, or out of any other act, omission or occurrence for which the United States armed forces are legally responsible, and causing damage in Japan to third parties, other than the Government of Japan, shall be dealt with by Japan in accordance with the following provisions:
>
> (a) Claims shall be filed, considered and settled or adjudicated in accordance with the laws and regulations of Japan with respect to claims arising from the activities of its Self-Defense Forces.

STATEMENT OF THE FACTS

Petitioner, Richard G. Symanowicz, was a United States citizen in Japan on a resident visa status. He was married to a Japanese national and was employed by a small Japanese firm, Kei Motor Company.

On December 16, 1970, Petitioner was involved in an automobile accident while transporting a set of four tires from Misawa to Fuchu, Japan at the request of and for the benefit of the United States Army and Air Force Exchange Service. On that date, in lieu of driving because of inclement weather and his own weariness, Petitioner had originally scheduled a flight back to Fuchu from Misawa. Agents of the Exchange made several in-

sistent phone calls to Kei Motors and without Kei Motor Company's authorization, delivered the tires to Kei Motor Company to be transported by Petitioner. Petitioner, after much persuasion, cancelled his flight and agreed to drive the tires to Fuchu on the Exchange's promise to "take care of everything". During the trip, a serious accident occurred between Petitioner and an unlit truck. Subsequent to the accident, the Exchange took possession of the tires and presumably completed delivery. Petitioner was seriously injured in the accident. He was taken to a Japanese hospital and remained there until being released on January 8, 1971.

On January 15, 1971, Petitioner was admitted to the Base hospital in Misawa after being cleared for treatment as an employee.[1] After examination by a neurosurgeon he was advised that he would need surgery at the Tachikawa Air Force Base Hospital. Petitioner was subsequently denied admittance to Tachikawa because he was told he was not an Exchange employee, the foregoing despite his previous designation as an employee.

As a result of the lack of additional treatment for his injuries, Petitioner remains permanently disabled.

Administrative proceedings in Japan, held by the Tachikawa Compensation Bureau pursuant to Japanese law, found that Petitioner could not collect workers' compensation from Japan because he was not performing work for Kei Motor Company. Under Japanese law[2] Petitioner

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1. Petitioner was originally advised, on or about January 9, 1971 that under the Status of Forces Agreement only civilian employees or a member of the military could be treated at the Base hospital.

2. Japanese Labor Standards Law and Enforcement Ordinance, Ch. I, Art. 8, 9 and 10, Law No. 49 (April 7, 1949).

was found to be a worker (i.e. employee) of the U.S. Exchange.[3]

Subsequently, Petitioner began to aggressively pursue his workers' compensation claim against the Exchange. Jurisdiction at first instance was invoked pursuant to 33 U.S.C. Section 901 et seq., as extended by 5 U.S.C. Section 8171.

In an order dated March 26, 1979, the Administrative Law Judge in the U.S. Department of Labor determined that Petitioner was not an employee of the Exchange at the time of the accident, and denied Petitioner's claim. The Benefits Review Board affirmed the decision on November 28, 1980. The Petitioner timely and properly appealed the decision in the United States Court of Appeals for the Seventh Circuit, where the administrative decision was reaffirmed.

In each decision, tests for determining independent contractor status versus servant, employee or borrowed employee status were considered. The decisions also looked to case law pursuant to the Longshoremen's and Harbor Workers' Compensation Act (hereinafter referred to as "the Act"), the statute regulating Petitioner's claim. The Seventh Circuit agreed with the administrative law judge's finding that Petitioner was acting as a "volunteer".

At each step of these proceedings, Petitioner has made reference to the Treaty of Mutual Cooperation and Security Between the United States and Japan and Status of Forces Agreement (hereinafter referred to as "the

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3. In Re Appeal of Kei Jidosha Hanbai K.K. Contract No. BJ 700102 and BJ 700103, ASBCA No. 16900 (Appeal of Sept. 12, 1972, Tokyo, Japan).

Treaty"), as it affected his employee status (A.L.J. Transcript, at 46-47). Both Petitioner and opponent counsel discussed the Japanese proceedings at length (A.L.J. Transcript, at 75, 81, 96+).

One of Petitioner's primary issues on appeal before the Seventh Circuit was that the Treaty mandated a different decision.

The Petition for Rehearing En Banc before the Seventh Circuit included a translation of Japanese law which was relevant to the outcome of this case pursuant to the Treaty. The Petition was denied.

REASONS FOR GRANTING THE WRIT

Judicial notice has never been given to the Treaty since the start of these lengthy United States proceedings in 1975. Petitioner has, for twelve years, suffered in legal limbo because of the conflict in workers' compensation law between the United States and Japan and the grievous omission of the courts to give notice to the Treaty, which serves to avoid such conflict.

Chaos in international law will result if the courts are permitted to ignore multi-government agreements such as the Treaty.

I. THE TREATY OF MUTUAL COOPERATION AND SECURITY BETWEEN THE UNITED STATES OF AMERICA AND JAPAN AND STATUS OF FORCES AGREEMENT SHOULD BE GIVEN JUDICIAL NOTICE AND REVIEW IN A WORKERS' COMPENSATION CLAIM WHERE FAILURE TO DO SO CREATES AN INTERNATIONAL CONFLICT OF LAW AND RESULTS IN AN UNJUST DECISION TO CLAIMANT.

A. Judicial Notice Must Be Given to the Treaty.

Article VI, Clause 2, of the United States Constitution provides that treaties made under the authority of the United States "shall be the supreme law of the land".

A United States treaty is the law of the land and all state and federal courts are bound to take judicial notice. *United States v. Rauscher*, 119 U.S. 407 (1886). A treaty is to be construed on principles similar to those applied to contracts and statutes. *Sullivan v. Kidd*, 254 U.S. 433 (1921). A written declaration, annexed to a treaty at the time of its ratification, is as obligatory as if the provisions had been inserted in the body of the treaty itself. *Doe ex dem Clark v. Braden*, 16 U.S. 635 (1853).

The United States-Japanese Treaty presently at issue was signed by representatives of both countries on January 19, 1960 and ratified in June, 1960. It is therefore a binding law to which judicial notice must be given.

B. Proper Notice to Applicable Sections of the Treaty and Japanese Proceedings Held Pursuant to the Treaty Would Mandate a Decision in Favor of Petitioner and Avoid an International Conflict of Law.

A Treaty supercedes a prior act of Congress. Otherwise, the declaration in the Constitution that a treaty "shall be the supreme law of the land" would not have due effect. *United States v. Lee Yen Tai*, 185 U.S. 213 (1901); *J. Ribas y Hijo v. United States*, 194 U.S. 315 (1904).

When the question is whether an act of congress has been superceded in whole or in part by a subsequent treaty, effect must be given to both so far as possible. *United States v. Lee Yen Tai, supra.*

The opinion rendered by the lower tribunals in this claim looked to common law and the Longshoremen's and Harbor Workers' Compensation Act, which was enacted March 4, 1927. The Treaty became enforceable as law on June 23, 1960 and clearly supercedes the law by which Petitioner's claim has been rejected.

The Treaty mandates that claims such as Petitioner's be determined pursuant to Japanese law. Japanese proceedings, pursuant to the Treaty, have determined that Petitioner was working for the Exchange. The present ruling by the United States tribunals is in direct conflict with the Japanese decision and infringes upon applicable sections of the Treaty. Effect must be given to both the Treaty and the Act to avoid the present conflict.

C. Proper Judicial Notice and Review of the Treaty Will Avoid Conflicts of International Law and Will Result in a More Just Decision.

In interpreting and applying the provisions of the Act, traditional legal concepts should not be binding. Statutory terms should be given broad application to accomplish the remedial aims of the statute. *Michigan Mutual Liability Co. v. Arrien*, 233 F. Supp. 496, *affd.* 344 F.2d 640, *cert. den.* 382 U.S. 835 (1964). The Act should be liberally construed. *Baltimore & Philadelphia S.B. Co. v. Norton*, 284 U.S. 408 (1932).

In view of its beneficant purposes, the Act is to be given liberal construction. *Pillsbury v. United Engineering Co.*, 342 U.S. 197 (1952). Liberal construction of the Act in conformance with its purpose "should avoid harsh and incongruous results". *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977).

Case law regarding the Act demonstrates an effort by the courts to look to equity in resolving such claims. Had the lower courts given effect to both the Treaty and the Act at issue, the present conflict could have been avoided through the equitable allowances provided by the Act.

Further, failing to give judicial notice to the Treaty unjustly leaves Petitioner with no remedy or source of compensation.

CONCLUSION

The Constitution requires that judicial notice be given to the Treaty. Failure to do so has resulted in a decision which creates a conflict between the laws of the United States and Japan and leaves a United States citizen with no forum for his workers' compensation claim.

By giving proper notice to the Treaty in concert with the equitable application of the Act, the lower courts can avoid an international conflict of law and construct a remedy which will fairly compensate Petitioner for his serious and permanent injuries.

Respectfully submitted,

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